

STATE OF MICHIGAN
COURT OF APPEALS

RICHARD DUMAS, LYNN MCBRIDE, and
EUGENE PASKO,

UNPUBLISHED
April 14, 2000

Plaintiffs-Appellees,

v

AUTO CLUB INSURANCE ASSOCIATION,

No. 208617
Wayne Circuit Court
LC No. 83-316603-CK

Defendant-Appellant.

Before: Gage, P.J., and Smolenski and Zahra, JJ.

PER CURIAM.

This case has a lengthy appellate history. The current appeal stems from defendant's application for leave to appeal from a circuit court order that denied reconsideration of an earlier order granting plaintiffs-appellees' motion for entry of a scheduling order to allow them to prosecute certain age discrimination claims based on quota production standards (sometimes referred to as the "quota age discrimination claims"). This Court peremptorily reversed the order granting the motion for the scheduling order and remanded for entry of an order finalizing closure of the case. In lieu of granting leave to appeal, our Supreme Court vacated this Court's order and remanded for plenary consideration as on leave granted. Having given plenary consideration to the parties' arguments, we affirm the trial court's order granting the motion for the scheduling order and denying reconsideration, and remand for further proceedings.

I

The procedural history of this case is lengthy, but is set forth in some detail below because it is material to a proper understanding of our resolution of this appeal.

The Circuit Court Case

Plaintiffs-appellees commenced this action in May 1983 as commissioned salespersons employed by defendant. Underlying their complaint were modifications made by defendant to their employment terms. Defendant changed the compensation system from one calculating a commission

based on a percentage of the insurance premium to one calculating the commission as a specific dollar amount. Further, minimum production standards (quotas) were implemented for commissioned salespersons. Under the minimum standards, if the salesperson did not produce a certain number of sales during a particular time period, he or she received an oral warning, followed subsequently by a written warning, probation, and termination or demotion.

In their May 1983 complaint, plaintiffs-appellees alleged counts based on breach of contract (Count I), age discrimination under the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* (Count II), intentional infliction of emotional distress (Count III), a criminal misdemeanor statute, MCL 750.352; MSA 28.584 (molesting and disturbing persons in pursuit of an occupation) (Count IV), fraud and misrepresentation (Count V), and unjust enrichment (Count VI). Plaintiffs-appellees also sought class action certification, but the action was not certified. Instead, the complaint was amended a number of times during the proceedings to add and remove individuals as plaintiffs.¹

In January 1984, pursuant to a motion for accelerated or summary judgment brought by defendant, the original judge assigned to this case, Judge John Hausner (hereafter "original judge"), dismissed a portion of plaintiffs-appellees' complaint.² A first amended complaint was thereafter filed by plaintiffs-appellees including counts for breach of contract, age discrimination, fraud and misrepresentation, and unjust enrichment. Four more amended complaints were filed in 1984 for additions or changes to the individuals named as plaintiffs.

The 1985 Stay and Subsequent Amendments to the Complaint

In March 1985, the original judge set aside the January 1984 order partially granting summary judgment on the breach of contract count. In April 1985, Judge Michael Stacey held a hearing on the parameters for this litigation.³ Questions were raised at the hearing on whether parts of the case should be stayed. Further, defendant's attorney indicated that appellate court cases pertinent to the instant case were pending. After the hearing, an order was entered for claims on changes in the commission system to be tried in a bifurcated process, with liability and damages tried separately. Claims pertinent to quota production standards were to be stayed in their entirety pending resolution of appellate issues.

Later in 1985, a sixth amended complaint was filed, which added a count that defendant should be estopped from denying the existence of contractual provisions and representations. Seventh and eighth amended complaints were later filed for changes to the individuals named as plaintiffs.

The October 3, 1986 Order Granting Partial Summary Disposition

On October 3, 1986, the original judge entered an order to grant partial summary disposition in favor of defendant on all counts insofar as they challenged defendant's change in the method of compensation with the exception that breach of contract claims of three plaintiffs, Kenneth Kwasnik, Harold Counts and John Haus, based on the compensation method were not dismissed. The order was certified as final pursuant to MCR 2.604(A), as then adopted.⁴ Plaintiffs-appellees and other plaintiffs filed an appeal as of right from this order with this Court (hereafter "certified appeal") which resulted in

this Court's published opinion of *Dumas v Auto Club Ins Ass'n*, 168 Mich App 619; 426 NW2d 480 (1988) ("*Dumas I*"). On October 3, the original judge also entered a separate order granting defendant's motion to dissolve the 1985 stay "insofar as it bifurcates the trial and stays mediation/discovery on damages."

While the certified appeal was pending, the original judge entered an order on August 7, 1987, to grant summary disposition in favor of defendant on the contract claims of plaintiffs Kwasnik, Counts and Maus. The order did not specify that it was being certified as final under MCR 2.604(A). These three plaintiffs filed an appeal as of right to this Court. See *Kenneth Kwasnik, Harold Counts, Sr. and John W. Maus v Auto Club Ins Ass'n*, unpublished opinion per curiam of the Court of Appeals, issued April 8, 1993 (Docket No. 102988).⁵

The Certified Appeal: *Dumas I*

In *Dumas I*, this Court found that summary disposition on the contract and unjust enrichment claims was improper. With regard to the age discrimination count, plaintiffs-appellees and other plaintiffs claimed error with regard to the original judge's ruling to grant summary disposition based on a prior ruling of the National Labor Relations Board and the statute of limitations. This Court affirmed on a different basis than the original judge, holding that summary disposition was proper because no proofs were offered "showing that age was a determining factor in defendant's decision to change the compensation system." *Id.* at 639. This Court also noted that the "minimum production aspect of this case was stayed in the trial court." *Id.* at 627 n 3.

On August 1, 1988, this Court denied rehearing for the certified appeal. Our Supreme Court granted leave to appeal and, on July 31, 1991, issued its opinion in *Dumas v Auto Club Ins Ass'n*, 437 Mich 521; 473 NW2d 652 (1991), which reversed this Court's decision that the action for breach of contract and unjust enrichment could be maintained against defendant. Although the age discrimination count was not addressed, Justice Riley noted, in an opinion joined by Justices Brickley and Griffin, that the age discrimination claim was dismissed in the lower court. *Id.* at 527.

The Trial Court's Interpretation of *Dumas I*

In October 1992, an attorney, representing two of the plaintiffs in a separate legal malpractice action arising out of their legal representation in the instant case, filed a motion to determine the status of the instant case.⁶ An attorney representing the law firm in the legal malpractice action filed a concurrence to the motion, seeking a declaration that viable age discrimination claims were pending because they were not dismissed by court order. At a hearing held in November 1992, the original judge stated his opinion that "everything that remained to be resolved was resolved," at both the trial and appellate levels.

The February 1993 Motion to Schedule Further Proceedings

Thereafter, in February 1993, the attorney of record for plaintiffs-appellees and other plaintiffs in the instant case filed a motion to schedule further proceedings. The original judge denied the motion

in an order entered March 5, 1993. At the hearing, the original judge ruled that his October 3, 1986 order ended everything in the case, except for the claims of plaintiffs, Kwasnik, Counts and Maus whose claims were involved in *Kwasnik, supra*. Plaintiffs-appellees and the other plaintiffs filed an appeal as of right from the original judge's March 5, 1993 order in *Dumas v Auto Club Ins Ass'n* (Docket No. 162879) ("*Dumas II*"). While the appeal in *Dumas II* was pending, this Court entered an unpublished opinion in *Kwasnik, supra*, that affirmed the trial court's order dismissing the claims of plaintiffs Counts and Maus.

Dumas II: This Court's Dismissal and Our Supreme Court's Order

Then, on May 7, 1993, this Court dismissed the appeal of the original judge's order in *Dumas II* "for lack of jurisdiction because the order entered March 5, 1993, is a post-judgment order." After this Court denied rehearing in August 1993, an application for leave to appeal was filed with our Supreme Court. However, rather than granting or denying the application for leave to appeal, in *Dumas v Automobile Club Ins Ass'n*, 446 Mich 864-865; 522 NW2d 629 (1994), our Supreme Court ordered the trial court to clarify whether that court's October 3, 1986 order contemplated disposition of the quota age discrimination claims and to hold an evidentiary hearing on whether the age discrimination claims were abandoned:

Leave to appeal is considered and, pursuant to MCR 7.302(F)(1), in lieu of granting leave to appeal, we REMAND this case to the Wayne Circuit Court for an evidentiary hearing on the question whether the plaintiffs in this matter have abandoned their age discrimination claims. We DIRECT the trial court to clarify whether its October 3, 1986 order contemplated disposition of the "quota" age discrimination claim as well as the "method of compensation" age discrimination claim. We observe that the decision of the Court of Appeals in this matter, found at 168 Mich App 619, 639, 425 NW2d 480 (1988) could be interpreted as a finding that the trial court had properly granted summary disposition of all of plaintiffs' age discrimination claims. The findings of the trial court shall be filed with the Clerk of this Court within 60 days of the date of this order.

The motion to strike brief in opposition remains under consideration by this Court.

We retain jurisdiction.

The original judge responded to our Supreme Court's order with written findings dated September 20, 1994 as follows:

This Court conducted an evidentiary hearing on September 16 and 19, 1994, pursuant to the August 2, 1994 Order of the Michigan Supreme Court. Plaintiffs and Defendant were given an opportunity to call witnesses, introduce exhibits (including portions of the record in this action), and present oral argument. After due

consideration of the evidence presented, this Court finds, for the reasons fully stated on the record on September 19, 1994:

- (1) This Court's October 3, 1986 order did not contemplate disposition of the Plaintiffs' "quota" age discrimination claims;
- (2) Plaintiffs have abandoned their "quota" age discrimination claims.

On May 12, 1995 our Supreme Court denied the application for leave to appeal in *Dumas v Auto Club Ins Ass'n*, 448 Mich 930; 534 NW2d 520 (1995):

Leave to appeal and the materials produced in response to this Court's order of August 2, 1994 are considered. The application is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court. Motion to strike is DENIED.⁷

Dumas III: The Appeal From the Trial Court's Findings

In June 1995, plaintiffs-appellees filed a separate appeal from the original judge's September 20, 1994 findings in *Richard Dumas, Lynn McBride and Eugene Pasko v Auto Club Ins Ass'n* (Docket No. 186479) ("*Dumas III*"). This Court dismissed the appeal in *Dumas III* pursuant to MCR 7.216(A)(10), "for lack of jurisdiction because the order of September 20, 1994, is not appealable by right. MCR 7.203(A)(1)." *Dumas III, supra*, unpublished order of the Court of Appeals, issued August 23, 1995.

The Successor Judge Reconsiders Abandonment After Dumas III

Further lower court proceedings were presided over by Judge William Giovan (hereafter "successor judge") on whether an order disposing of the case should be entered or whether a scheduling order for proceedings on the quota age discrimination claim should be granted. Pursuant to hearings conducted between December 1995 and March 1996, the successor judge concluded that he had authority to revisit the question of whether quota age discrimination claims were abandoned. The successor judge construed the original judge's findings as having been based on principles of abandonment through neglect. Although finding attorney neglect for purposes of his decision, the successor judge determined that no court or person intended that the case be dismissed. After concluding that the record showed no prejudice to defendant, the successor judge ruled that a scheduling order should be entered. Based on this ruling, the successor judge entered an order on April 25, 1996, to grant the motion for entry of a scheduling order, noting as part of that order that his ruling "also necessarily contemplates that the stay of proceedings entered . . . on May 8, 1985, is hereby dissolved." Defendant moved for reconsideration of the April 25, 1996 order, but the successor judge denied the motion.

Dumas IV: Appeal from the Successor Judge's Order Granting the Motion for a Scheduling

Order

Defendant then filed an application for leave to appeal to this Court in *Richard Dumas, Lynn McBride and Eugene Pasko v Auto Club Ins Ass'n* (Docket No.196125) ("*Dumas IV*"). On October 28, 1996, this Court peremptorily reversed the successor judge's April 25, 1996 order and instructed the trial court to enter an order finalizing closure of the case:

Pursuant to MCR 7.205(D)(2), the April 25, 1996 order of the Wayne Circuit Court in this cause is REVERSED, and the cause is REMANDED with instructions to enter an order finalizing closure of this case, addressing as necessary such post-judgment issues as taxation of costs, etc. When plaintiffs appealed the original final judgment of the circuit court in this cause to this Court, *Dumas v Auto Club Ins Ass'n*, [168 Mich App 619; 426 NW2d 480 (1988)], they were free to raise any issue concerning any order of the trial court entered in conjunction with or prior to final judgment from which appeal of right was claimed. *Tomkiw v Saucedo*, [374 Mich 381, 385; 132 NW2d 125 (1965)]. Although the circuit court had granted summary disposition against plaintiffs' claims for age discrimination, plaintiffs opted not to challenge that ruling. [*Dumas, supra* at 626]. The Supreme Court, in granting further review, similarly noted that plaintiffs had failed to appeal the adverse ruling on their age discrimination claims. *Dumas v Auto Club Ass'n*, [437 Mich 521, 527 n 2; 473 NW2d 652 (1991)]. The Supreme Court's order of remand accordingly authorized the circuit court to take action not inconsistent with the Supreme Court's opinion and order, but res judicata precludes the trial court from considering issues not considered by the appellate courts during the original appeal, if those issues could have been raised on prior appeal. *Hadfield v Oakland Co Drain Comm'r (After Remand)*, [218 Mich App 351, 355; 554 NW2d 43 (1996)], citing *VanderWall v Midkiff (After Remand)*, [186 Mich App 191; 463 NW2d 219 (1990)]. Summary disposition on plaintiffs' breach of contract and unjust enrichment claims having been affirmed by the Supreme Court, and all plaintiffs' other claims having previously been dismissed by the circuit court, which dismissal was either upheld by this Court or not challenged on appeal of right by plaintiffs, no claims or issues remain for the circuit court on remand other than post-judgment housekeeping matters. This Court retains no further jurisdiction.⁸

Our Supreme Court subsequently vacated our October 28, 1996 order, and, in lieu of granting defendants' leave to appeal, remanded the case to us for plenary consideration as on leave granted. *Dumas v Auto Club Ins Ass'n*, 456 Mich 902; 572 NW2d 9 (1997). Given this lengthy history of over sixteen years of pre-trial motions and appeals, we now consider the present appeal.

II

In its first issue, defendant contends that the trial court erred when it held that our Supreme Court's May 12, 1995 order in *Dumas II* did not establish that further proceedings in the case were unnecessary. We disagree. In reviewing this issue, we note that the underlying trial court order before our Supreme Court in *Dumas II* was the original judge's March 5, 1993 order denying the motion to schedule further proceedings. The proper interpretation of the Supreme Court's order is a question of law that we review de novo. *Cardinal Mooney High School v Michigan High School Athletic*

Ass'n, 437 Mich 75, 80; 467 NW2d 21 (1991). Consistent with MCR 7.321, which provides that the "reasons for denying leave to appeal . . . are not published," our Supreme Court's order does not specify why the application for leave to appeal from our order in *Dumas II* was denied or why the Court was not persuaded that the questions raised should be reviewed. Rather, the May 12, 1995 order specifies only that the Court considered material produced in response to its August 2, 1994 order (i.e., the original judge's findings of September 20, 1994). Our Supreme Court's denial of an application for leave to appeal does not constitute a ruling on the merits of the case. *Frishett v State Farm Mutual Automobile Ins Co*, 378 Mich 733, 734 (1966); *People v Hines*, 88 Mich App 148, 152; 276 NW2d 550 (1979). Thus, our Supreme Court's May 12, 1995 order was not an adjudication that the case was over as claimed by defendant.

III

Defendant next claims that the successor judge abused his discretion by overruling the original judge's factual findings on abandonment. We find it unnecessary to address defendant's claim, because the doctrine of abandonment does not apply to plaintiffs-appellees' quota age discrimination claims. See Section IV, *infra*.

IV

Defendant next claims that the successor judge erred in holding that a plaintiff can never lose the ability to proceed with claims pleaded in a Michigan court unless the claims are formally dismissed in accordance with the court rules. We disagree.

In reviewing this claim, we find that the parties' arguments present a threshold question that must be resolved as to whether the successor judge acted pursuant to MCR 2.604(A) or MCR 2.612(C) when deciding if an abandonment doctrine existed that should preclude it from issuing a scheduling order for the quota age discrimination claims. On appeal, the parties contend that MCR 2.612(C)(1) applies to the present case. That rule permits a trial court, on motion and just terms, to "relieve a party . . . from a final judgment, order, or proceeding" on six specific grounds. MCR 2.604(A) provides that "an order . . . adjudicating fewer than all the claims, or the rights and liabilities of fewer than all the parties, does not terminate the action as to any of the claims or parties, and the order is subject to revision before entry of final judgment" This Court has construed MCR 2.604 as permitting a successor judge to modify an order entered before final judgment to reflect a more correct adjudication of the rights and liabilities of litigants. See *Meagher v Wayne State Univ*, 222 Mich App 700, 718-719; 565 NW2d 401 (1997), and *Mikedis v Perfection Heat Treating Co*, 180 Mich App 189, 204, n 4; 446 NW2d 648 (1989).⁹

Whether a final order was entered before the successor judge entered the scheduling order presents a question of law that we review de novo. See *Cardinal Mooney High School*, *supra* at 80. While the successor judge did not specify the court rule upon which he relied in granting the motion for a scheduling order, his decision substantively reflects that he applied MCR 2.604(A) because he did not believe that a final order disposing of all claims was entered by the original judge.¹⁰ We agree with the successor judge's conclusion that a final order was not entered and that MCR 2.604 applied.

Based upon our review of the record in this case, we conclude that no final order was entered in this case because the trial court never dismissed the quota age discrimination claims. The original judge certified the October 3, 1986 final judgment under the former version of MCR 2.604, which allowed him to “direct entry of a final judgment on one or more but fewer than all the claims or parties, but only on an express determination that there is no just reason for delay.” However, mere certification of an order granting partial summary disposition as a “final judgment” under the former version of MCR 2.604(A) does not resolve whether an order is actually final for purposes of exercising this Court’s jurisdiction under MCR 7.203. *Faircloth v Family Independence Agency*, 232 Mich App 391, 400-401; 591 NW2d 314 (1998). Thus, an order certified as a “final judgment” under the former version of MCR 2.604(A), but which explicitly provided that additional proceedings would occur, was not “final” for purposes of this Court’s jurisdiction under MCR 7.203. *Id.* at 401.

Here, the trial court’s “Final judgment, except as to Kwasnik, Counts and Maus,” entered October 3, 1986, stated in pertinent part:

This matter having been heard on Defendant’s Motion for *Partial* Summary Disposition, and the Court, having reviewed all of the pleadings; having heard oral argument on August 19, 1986; and having dictated the reasons for its decision from the bench on August 19, 1986 after being fully advised in the premises:

IT IS HEREBY ORDERED, ADJUDGED AND DECREED:

1. That Counts II - V (age discrimination, fraud and misrepresentation, unjust enrichment, promissory estoppel) are dismissed with prejudice, *insofar as those counts challenge defendants’ change in its method of compensation.*
2. That Count I (breach of contract) is dismissed with prejudice insofar as that count challenges the defendants’ change in its method of compensation except there is no dismissal as to plaintiffs Kenneth Kwasnik, Harold Counts and John Maus.
3. That, pursuant to MCR 2.604(A), there is no just reason for delay and, therefore, the instant order shall constitute a final judgment.

SO ORDERED. [Emphasis added.]

An objective reading of the language in the October 3, 1986 final judgment leads to the conclusion that the judgment was not intended to dispose of all claims; hence, our Supreme Court’s August 2, 1994 request for the original trial judge to clarify as to whether the order dismissed the quota age discrimination claims. *Dumas II, supra*, 446 Mich 864-865. In response to the Supreme Court’s request, the trial court found that the judgment was not intended to dismiss those claims. We also note that the trial court’s May 8, 1985 “Order regarding plaintiffs’ motion to establish manageable parameters for complex litigation,” stated in paragraph two that “[a]s to Plaintiffs’ claims regarding production standards, these claims shall be stayed in their entirety pending resolution of appellate issues.” While the original judge’s October 3, 1986 order dissolved the stay as to certain issues, we

conclude that the order did not affect the stay as to the production quota claims. Because the October 3, 1986 final judgment did not dismiss all age discrimination claims, and given that the claims regarding production standards were stayed pending appeal of other issues, we agree with the original judge's finding that the October 3, 1986 "final judgment" did not dispose of the quota age discrimination claims at issue in this case.

In addition, we find merit in the parties' positions on appeal that the September 20, 1994 "findings" is not an order because it does not contain a command relative to the quota age discrimination claims. See generally *McAuley v General Motors Corp*, 457 Mich 513, 518; 578 NW2d 282 (1998) (words in a court rule should be construed according to their commonly accepted meaning). Thus, the trial court's findings of September 20, 1994 were not an adjudication, but merely a response to a request by our Supreme Court for additional information for use in determining whether to grant an application for leave to appeal. Here, because no final order was entered, we conclude that the successor judge had authority pursuant to MCR 2.604(A) to modify the original judge's order denying the motion to enter a scheduling order to reflect a more correct adjudication of the rights and liabilities of the litigants.

However, we also note the actions of both the original judge and the successor judge occurred in response to the orders and opinions of both this Court and our Supreme Court in the previous appeals. In our order of peremptory reversal in *Dumas IV*, we concluded that plaintiffs-appellees' claims were dismissed by the trial court or left unchallenged on appeal in *Dumas I*, and that no issues remained for the trial court. However, our Supreme Court's vacation of that order and remand for plenary consideration requires us to reconsider our conclusion in *Dumas IV*, which we reached by considering our previous orders and opinions in *Dumas II* and *Dumas III*. We are mindful of the law of the case doctrine, which provides that once an appellate court has passed on a legal question and remanded the case for further proceedings, the legal questions determined by the appellate court will not be determined differently on a subsequent appeal where the facts remain the same. *Kalamazoo v Dep't of Corrections (After Remand)*, 229 Mich App 132, 135; 580 NW2d 475 (1998). While our previous orders entered in *Dumas II* and *Dumas III* presupposed that the trial court entered a final judgment in this case before March 5, 1993, our determination regarding the existence of a "final judgment" was put into question when our Supreme Court vacated our order in *Dumas IV*. "Where a case is taken on appeal to a higher appellate court, the law of the case announced in the higher appellate court supersedes that set forth in the intermediate appellate court." *Johnson v White*, 430 Mich 47, 53; 420 NW2d 87 (1988). Given that our Supreme Court vacated our order in *Dumas IV*, we conclude that our previous characterization of various orders as "postjudgment" was in error and not binding as the law of the case.

Having established that the successor judge was acting pursuant to MCR 2.604, we shall now address defendant's contention that the successor judge erred when he revisited the original judge's order and rejected the doctrine of abandonment. This Court reviews questions of law de novo. *Cardinal Mooney High School, supra* at 80. In general, we agree with defendant's claim that Michigan courts have inherent powers outside the provisions of the court rules, which arise from the courts' fundamental interest in protecting their integrity and that of the judicial system. *Brenner v Kolk*,

226 Mich App 149, 159-160; 573 NW2d 65 (1997). Inherent powers include the power to move cases on the docket by a variety of sanctions, including dismissal, discontinuance, or involuntary nonsuit. *Banta v Serban*, 370 Mich 367, 368; 121 NW2d 854 (1963). Nonetheless, the trial court's inherent powers to dismiss a plaintiff's suit are not without limits. "Dismissal is the harshest sanction that the court may impose on a plaintiff." *Schell v Baker Furniture Co*, 232 Mich App 470, 475; 591 NW2d 349 (1998), *aff'd* ___ Mich ___ (2000). As a result, a trial judge must follow the procedure set forth in our court rules when the rules authorize an involuntary dismissal. See, e.g., *Henry v Prusak*, 229 Mich App 162, 168; 582 NW2d 193 (1998), in which we stated that "[a] trial court's authority to enter a default or a default judgment against a party must fall within the parameters of the authority conferred under the court rules." See also, *Schell, supra* at 478-479 in which we held that the trial court's involuntary dismissal was improper because it failed to comply with the applicable court rule.

Here, because we have a specific court rule, MCR 2.502, which provides a mechanism for involuntary dismissal of a suit for lack of progress, we conclude that the original judge did not have inherent authority to dismiss plaintiffs-appellees' suit without complying with the rule. MCR 2.502(A)(1) requires the trial court to notify the parties before dismissing a case for lack of progress:

The court may notify the parties in those actions in which no steps or proceedings appear to have been taken within 91 days that the action will be dismissed for lack of progress unless the parties show that progress is in fact being made or that the failure to prosecute is not due to the fault or lack of reasonable diligence of the party seeking affirmative relief.¹¹

A dismissal for lack of progress is without prejudice unless the court specifies otherwise, and the court has the discretion to reinstate the action for good cause. MCR 2.502(B)(1); MCR 2.502(C). Here, the original judge did not give plaintiffs-appellees notice of his intent to dismiss their claims for lack of progress. "It is improper to dismiss a case where the required notice was not given." *Vincencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504-505; 536 NW2d 280 (1995). Because MCR 2.502 provides a mechanism for dismissal of a case for lack of progress, and the original judge failed to follow the notice requirements set forth in the rule, we conclude that the original judge did not have inherent authority to dismiss the present case with prejudice on the basis of abandonment independent of the rule.

Our conclusion is supported by our Supreme Court's opinion in *McKenzie v A P Cook, Co*, 113 Mich 452; 71 NW 868 (1897). *McKenzie* presented the following facts. In 1878 A. P. Cook commenced a suit in ejectment against the plaintiff regarding certain farm property. Cook conveyed the property to defendant in 1888 and died in 1889. Then, in 1893, the plaintiff filed a bill to quiet title to the property. That same year, Cook's administrator revived the fifteen-year-old ejectment suit. The trial court quieted the title in favor of the plaintiff and the defendant appealed. In reversing the trial court, our Supreme Court rejected the plaintiff's contention that Cook abandoned the ejectment suit:

After the ejectment suit was planted and was at issue, it was within the power of either party to bring the case on for hearing. Neither the plaintiff nor defendant saw fit to do so. The evidence does not show any actual intent on the part of Mr. Cook to

abandon the prosecution of the case. *It is true, there was a long delay, but no steps were taken to press the case to a hearing, and no motion in the case itself has been made to dismiss the suit for a failure to prosecute.* If such practice is admissible in ejectment,-- a point which we do not decide, -- a motion should have been made in the case, while the court could fix such terms as might be reasonable. [*McKenzie, supra* at 455.] [Emphasis added.]

While *McKenzie* did not involve the trial court's failure to control its docket, we believe that the reasoning expressed by our Supreme Court applies to the original judge in the present action, i.e., a plaintiff's cause of action cannot be dismissed absent notice. While it is true that there was a long delay in the present case, the trial court took no steps to dismiss this case for lack of progress as required by MCR 2.502.

Defendant's reliance on *Environair, Inc v Steelcase, Inc*, 190 Mich App 289, 295; 475 NW2d 366 (1991), is misplaced because the general principle of "abandonment" applied therein was that an issue not raised in the trial court is not preserved for appeal. The general principles for preserving issues for review in an appeal do not, directly or by analogy, establish standards by which a trial court exercises inherent powers to sanction delay. Accordingly, we hold that the successor judge did not err in concluding that the doctrine of abandonment did not apply under the facts of this case. Because we have determined that the doctrine of abandonment does not apply in this case, we need not address defendant's remaining issues which relate to abandonment.

Affirmed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Hilda R. Gage

/s/ Michael R. Smolenski

¹ More than one hundred individuals were added as plaintiffs. Although the three original plaintiffs, Richard Dumas, Lynn McBride, and Eugene Pasko, have been identified as the appellees in this appeal, we note that the only named plaintiff-appellee actively involved in pursuing proceedings relative to the order appealed was Eugene Pasko. We also note that the lower court record is unclear as to how many plaintiffs remain in this action. Thus, we express no opinion on whether other individuals should have been designated as plaintiffs-appellees. However, for purposes of our review, we will refer to the three original plaintiffs as the plaintiffs-appellees. Other individuals participating in the lawsuit are referred to as plaintiffs.

² It is unclear from the record before us as to which counts were dismissed by the original judge.

³ The record reflects that Judge Stacey, rather than the original judge, addressed this matter because procedures at that time provided for a central calendar for case control, rather than individual dockets.

⁴ MCR 2.604(A), as amended in 1995, eliminated the procedure under which a trial court could direct entry of final judgment on fewer than all the claims or parties.

⁵ Kwasnik was later dismissed by stipulation and ultimately did not participate in the appeal.

⁶ Prior to this case status request, we note that this Court issued an opinion in April 1992 for a different case, *Wolff v Automobile Club of Michigan*, 194 Mich App 6; 486 NW2d 75 (1992), arising out of defendant's implementation of the same quota production standards that underlie part of the instant case. This Court upheld the lower court's denial of judgment notwithstanding the verdict on an age discrimination claim.

⁷ Justice Levin stated that he would remand this case to the Court of Appeals for plenary consideration.

⁸ The order further stated that Judge Neff would not peremptorily reverse, but would grant leave to appeal.

⁹ In the case at bar, neither party claims that the successor judge was not formally reassigned the case or had any limitations on the reassignment. Thus, for purposes of our review, we have assumed that the successor judge could enter whatever orders the original judge could have entered had he continued to preside in this case, including correction of a prior ruling under MCR 2.604(A) before final judgment.

¹⁰ Because neither party was misled, the successor judge's failure to specify the court rule that he relied upon as the basis for its grant of the scheduling order will not preclude appellate review. *Cf. Jones v Employers Ins of Wausau*, 157 Mich App 345, 349-359; 403 NW2d 130 (1987). Indeed, while defendant incorrectly relies on MCR 2.612(C)(1)(f), the lower court record reflects that defendant was aware that the applicability of MCR 2.604 to the successor judge's action was at issue (e.g. MCR 2.604 was addressed in a second addendum to a supplemental brief filed by defendant in opposition to a scheduling order).

¹¹ While MCR 2.502 was amended in 1991, its basic provision authorizing the court to send notice to the parties has remained constant throughout the pendency of this case.